IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.627 OF 1994.

Bharat Dashrath Surve
resident of Degaon,
Taluka North Solapur,
Dist : Solapur. .. Appellant
(Org. Accd. No.2)

vs.

1. The State of Maharashtra

2. Rajendra Damodar Wankar
res. at Degaon,
Tal : North Solapur,
Dist : Solapur. .. Respondents.

R.V.More, Advocate for the Appellant.

V.B.Konde Deshmukh, APP for the Respondent.

CORAM : S.S.PARKAR &
S.R.SATHE, JJ.

DATED : 17TH DECEMBER, 2004.

JUDGMENT :

1. Appellant, the original accused no.2 in Sessions Case No.244 of 1993 has preferred this appeal against the judgment and order passed by the Court of 4th Additional Sessions Judge,

Solapur whereby he was convicted for the offences punishable under section 302 r/w.34 of I.P.C. and 307 r/w. 34 of I.P.C. and sentenced to suffer imprisonment for life and R.I. for seven years and to pay fine of Rs.15,000/- i.d. to suffer R.I. for one year.

2. Brief facts giving rise to this appeal are as under :

. On 20.5.1993 at about 10 a.m. Rajendra and his brother deceased Anil were going on Rajdoot motorcycle from Wankat Vasti to Solapur. When they reached near Koyna Nagar, accused Bharat(present appellant) and his brother Balu came from the opposite side i.e. from Solapur Side on T.V.S.Suzuki. Balu was riding the said motorcycle. He gave dash with his motorcycle to the motorcycle which was driven by Rajendra. As a result of the said dash Rajendra and Anil fell in a ditch by the side of the road. The motorcycle of Balu also fell on the road. Immediately thereafter, Balu took Kukri and assaulted Anil with Kukri on his head, back and abdomen. Not

only that but the present accused Bharat also took out his knife (weapon which apparently looks like Adkitta(nut cracker), but after opening and can be used as knife) and assaulted Anil and Rajendra. As a result of the same both sustained bleeding injuries. Rajendra sustained bleeding injuries. On that Balu and Bharat ran away towards Solapur side by leaving their motorcycle at that place.

3. It is prosecution case that when the said incident was going on, P.W.8 Kokre was passing by the side of the said road on his luna. After seeing the said incident instead of halting there he went to Prakash @ Chandrakant the step brother of Anil and informed him about the incident. Prakash therefore went to the place of incident. After reaching there they took injured Anil as well as Rajendra in a jeep to General Hospital, Solapur. The police constable on duty P.W.16. Yallappa Bansode made query with injured Anil and Rajendra and they told him that Bharat Surve and Balu Surve assaulted them with knife and kukri. He therefore made a report to Salgar Police Station and in turn PSI Deshpande was informed

about the incident. He, therefore, went to Special Executive Magistrate Gaikwad and informed him about recording the dying declaration of the two injured persons and actually took him to the hospital. S.E.M. Gaikwad then met the doctor on duty and confirmed to whether the injured are in a position to give statement. When the doctor informed him that they were in a position to give statement, S.E.M. Gaikwad obtained the necessary endorsement of the doctor on the paper and then recorded the dying declaration of Anil. Then he also recorded the statement of Rajendra. PSI Deshpande thereafter verified from the doctor as to whether Anil was in a position to give statement and recorded his statement, exhibit 62. He then sent the said statement to police station and on that basis same crime No.26/93 was registered.

4. In the meantime, at about 10/15 a.m. Balu and accused Bharat and Balu went to Maree Aai police station and there Balu lodged a complaint against Anil and Rajendra. Police recorded the said complaint and also attached the kukri and

knife, which were produced by Balu at the police station. On the basis of said complaint, exhibit 84, lodged by Balu, crime No.27/93 was registered. However, after investigation B Summary was granted for the said complaint. PSI Deshpande thereafter went to the place of offence and drew the panchanama on the same day i.e. on 20.5.1993 at about 4 p.m. Anil succumbed to the injuries sustained by him. The police then drew the inquest panchanama and also attached the clothes of injured under panchanama exhibit 46. PSI then sent the dead body for post mortem. After recording the statements of the witnesses, sending the attached property to the C.A.,and after completion of the investigation he submitted the chargesheet against accused Balu as well as the present appellant accused for the offences punishable under section 302 r/w.34 I.P.C. and 307 r/w.34 of I.P.C. and section 135 of the Bombay Police Act.

5. Finding that the accused are chargesheeted for the offences which are exclusively triable by the Court of Sessions, the learned JMFC committed

the case to Sessions Court, Solapur. During the pendency of the said case, accused no.1 Balu died and naturally case against him was abated. The learned 4th Additional Sessions Judge, Solapur, therefore, framed charge only against the present appellant accused for the offences mentioned above. The charge was readover and explained to the accused. Accused pleaded not guilty and claimed to be tried.

6. In order to bring home the guilt of the accused, prosecution examined as many as 18 witnesses consisting of the injured eye witness P.W.1 Rajendra Wankar exhibit 42, P.W.2. Laxman Gaikwad, panch for attachment of the clothes of accused, exhibit 43, P.W.3 Nagnath Surwase, panch for attachment of clothes of the deceased, exhibit 45, P.W.4. Dr. Dattatraya Kulkarni, who did the post mortem, exhibit 47, P.W.5 Nisar Shaikh, eye witness to the incident exhibit 53, P.W.6 Srikrishna Oak Maintenance Surveyor exhibit 54, P.W.7 Chandrakant Khandekar who produced the notification with regard to arms, exhibit 56. P.W.8 Dr.Asha Sangolkar exhibit 58, P.W.9 Yallappa

Gaikwad, Special Executive Magistrate, exhibit 70, P.W.10 Dr. Vijay Kanetkar, who examined the injured and also operated Rajendra, exhibit 73, P.W.11 Kishore Kokare, another eye witness exhibit 76, P.W.12 Dr. Kantilal Daga exhibit 77, P.W.13 Prabhakar Puranik, police head constable, exhibit 78, P.W.14 PSI Pandurang Salunkhe, exhibit 83, P.W.15 Arjun Jadhav, police constable, exhibit 86, P.W.16 Yallappa Bansode, constable who was attached to the General Hospital, exhibit 88, P.W.17 Police Constable Tukaram Shinde exhibit 91, and P.W.18 Investigating Officer, PSI Ratnakar Deshpande exhibit 95. Prosecution also produced the panchanama of clothes of the accused at exhibit 44, panchanama of clothes of the deceased, exhbit 46, post-mortem notes exhibit 49, map of the place of offence exhibit 55, notification issued by the Commissioner exhibit 57, dying declaration of Anil Wankar exhibit 61, Medical certificate of Bharat Surve exhibit 66, medical certificate of accused Balu Surve exhibit 67, and C.A. reports at exhibit 96 to 100. The defence did not adduce any evidence. However, from the suggestions put to the prosecution witnesses as

well as from the statement of accused recorded under section 313 of Cr.P.C. and the written say filed by the accused at exhibit 103, it appears that it was the defence of the accused that a day prior to the incident some quarrel had taken place at the time of Assembly election between the group of accused and the group of the deceased. In pursuance of the same on the next day i.e. in the morning of 20.5.1993 Rajendra had given threats to Balu. Thereafter at about 10.am. when Balu and Bharat were proceeding towards Solapur for lodging a complaint against Rajendra, at that time Anil and Rajendra chased them on motorcycle and when they were near Wankar Vasti, Anil gave a slap to Balu and fist blows on the stomach of Bharat. When they just went ahead Anil and Rajendra halted them and gave dash to their motorcycle, as a result of which Balu and Bharat fell in a ditch. At that time Rajendera took out Kukri from the dicky of his motorcycle and when he was about to assault, Balu snatched the said kukri from his hands and gave blows with it to Anil. At that very time, his brother Bharat took out a Adkitta(nut cracker) which was with him and gave

blow with the same to Anil. By that time he found that some other persons belonging to the group of deceased anil were coming to that place. They, therefore, ran away from the said place and went to Maree aai police chowki and there Balu lodged a complaint against Anil and Rajendra. Thus, the defence of the accused was of private defence of person and according to them Anil and Rajendra were aggressors.

7. After considering the entire evidence adduced by the prosecution and hearing the arguments of both the learned advocates, the learned Trial Judge came to the conclusion that at the relevant time accused Balu and Bharat were in fact aggressors and as a result of the same they were in fact not entitled to have any right of private defence of person. He also held that the evidence on record also shows that though there was no necessity to assault Anil and Rajendra, once Rajendra was disarmed, the accused persons gave several blows with deadly weapon on the vital parts of Anil and Rajendra, and thus both the accused in furtherance of their common intention

committed murder of Anil. So far as the injuries sustained by Rajendra are concerned, the trial Court held that the accused has committed offence punishable under section 307 r/w.34 of I.P.C and awarded the sentence as mentioned above.

8. It is this order that is being challenged in this Criminal Appeal. Shri More, learned Advocate for the accused has urged three points. Firstly, he submitted that the learned Trial Judge has not properly appreciated the evidence on record and wrongly held that the accused namely Balu and Bharat were aggressors. He also canvassed before us that the learned trial Judge ought to have taken into consideration the circumstance, namely Anil and Rajendra first gave dash to the motorcycle of the accused. Secondly, Rajendra took out kukri from the dicky of his motorcycle and tried to assault accused and accused snatched the said kukri and while doing so he sustained injuries to his palm. Thirdly, immediately after the incident, instead of absconding from the said place the accused persons immediately went to the police station alongwith

kukri and knife and at the earliest occasion they made a complaint wherein they have clearly stated that when Rajendra and Anil tried to assault Balu snatched the kukri with a view to save himself and hence Balu and Bharat assaulted Anil. The learned Advocate for the accused also canvassed before us that from the circumstances on record and the conduct of the accused it is necessary to hold that right of private defence was available to the present accused as well as to his brother and at no point of time they had acceded the said right of private defence. In the alternative, it was also argued before us that even if it is held that Balu exceeded the right of defence and gave several blows to Anil, still so far as the present accused Bharat is concerned, it can not be said that he had shared common intention alongwith his brother to exceed such attack and it cannot be said that he is guilty of the offence punishable under section 302 of I.P.C. Lastly, it was submitted that at the most the present accused can be held guilty in respect of his overt act i.e. for the offence under section 326 of I.P.C. As against this, the learned APP Shri Konde Deshmukh

supported the judgment and order passed by the trial judge. He submitted that there is abundant evidence on record to establish that accused were in fact the aggressors. They had common intention to commit murder. He, therefore, submitted that the appeal be dismissed.

9. It is not in dispute that on 20.5.1993 at about 10 a.m. some incident took place between deceased Anil and Rajendra on one side and present accused Bharat and his brother Balu on the other side. Admittedly, when Prakash, brother of deceased was informed about the incident he had gone to the said place and then Anil as well as Rajendra were taken by him to the General Hospital, Solapur. There he was examined by Doctor Kanetkar. Admittedly, Anil succumbed to the injuries sustained by him and thereafter his dead body was sent for post-mortem. Dr. Kulkarni, P.W.4, exhibit 47 did the post mortem and submitted the post-mortem notes exhibit 49. If we see the said post-mortem notes we find that the following external injuries as mentioned were found on person of Anil.

1. Incised wound left side of forehead above left eye brow 6cm x 1cm bone deep frontal bone left side partially chipped off 5 x 2cm x 0.5cm was the injury to the bone.

2. Incised stab wound left side of back of chest supra scapular region 3 x 0.8cm 9 cm deep directed back to front downwards and left to right.

3. Incised stab wound 1cm (Medially) to injury No.2 in supra scapular region of back of chest left side 4cm x 0.8.cm 10cm deep directed back to front downwards and to the right.

4. Incised wound in the right side back of chest 7 cm right of midline at thoracic vertebrae No.6, transverses level. Injury 3.8 x 1cm 11cm deep directed back to front upwards and medially.

5. Incised stab wound midline back of chest over vertebral column thoracic vertebrae No.7. transverse 4.2 x 1.2cm 9cm deep directed back to front upwards.

6. Incised stab wound on the right side of back side chest 10cm right of thoracic vertebrae 3.5 x 1cm 15cm deep, back to front upwards medially.

7. Incised stab wound midline back thoracic vertebrae No.10 region transverse 3 x 0.8cm 6cm deep muscle deep.

8. Incised stab wound right side of back of abdomen 8 cm right of lumber 1 and thoracic 12 vertebrae level, 3 x 1cm vertical upper angle act lower obtuse chest abdominal cavity deep directed back to front, upwards and medially.

9. Scratch on the back of chest supra scapular region 3x 0.8cm 9cm deep directed back to front down wards and left to

right.

10. Abrasion on the right side back of chest scapular region oblique 8 x 0.2cm directed above downwards with oval abrasion 1.5 x 1cm at upper end.

11. Abrasion rightside back of shoulder to right side back oblique 8 x 1cm.

12. Incised wound left palm at root of thumb to proximal phalanx tangential cut 2 x 0.5cm muscle deep.

13. Abrasion left palm near root of index finger 1 x 0.2cm.

14. Abrasion left palm proximal phalanx of little finger 2 x 1cm

15. Incised wound left palm 3cm below root of little finger 1.5 x 1cm tangential clean cut edges.

16. Abrasion left palm at foot of little finger 1cm x 0.1cm.

17. Incised wound right hand palmer aspect of tip of middle finger 1.2 x 0.2 cm muscle deep.

18. Incised wound on the right hand palmer aspect of thumb proximal phalanx todistal phalanx 3 cm x 3cm muscle deep tangential cut.

19. Surgically stitched wound right ankle cm in length with 4 stitches.

20. Surgically stitched wound left ankle 4cm in length with 3 stitches.

21. Surgically stitched wound right side of chest laterally over 6th inter coastal space cavity deep 5cm with 4 stitches.

The cause of death was opined by the doctor as "shock and haemorrhage due to multiple stab injuries at chest and abdomen involving vital structures". So, looking to this evidence there is absolutely no hesitation to held that the death of Anil was homicidal.

10. The next question that falls for consideration is whether the said death was caused due to assault made by the present accused or his brother Balu. While considering this aspect, at the outset it must be mentioned that the occurrence of incident is not at all in dispute. Not only that, but it is also an admitted fact that at the relevant time accused Balu gave blows with kukri to deceased and at that very time accused Bharat also gave three blows with Adkitta (which in fact can also be used as a knife) to Anil. They also assaulted Rajendra, as a result of which he also sustained very serious injuries as mentioned below.

1. Incised wound 1/2" X 1" over lumbo sackal region, Bone deep bleedings.

2. Incised wound over rt. scapular region, Bone deep bleedings

3. Abrasion over right scapular region-longitutional 1cm breadth.

4. Incised wound at T10-T11 4 X 1 1/2c Bone deep bleeding.

5. Incised wound over rt. lumbar region 5 X 2cm on ant.

6. Incised wound over lt. hypochondriac region 6 X2cm Bleeding.

7. Incised wound over Rt. lumbar region post aspect 2 1/2"X 1 cm.

8. 2 incised wounds over thoracic region No active bleeding.

His spleen was totally ruptured and spine was also damaged due to which he became paralytic. The

main question is whether these injuries were caused by the accused while exercising their right of private defence as according to them they had noticed that Rajendra had taken out a kukri from the dicky of his motorcycle and was about to assault. Infact, it is the case of prosecution that at the relevant time Anil and Rajendra were as usual proceeding towards Solapur and when they were accordingly passing through Sherkhan Vasti, accused Balu and his brother came there on their TVS Suzuki motorcycle from the opposite side i.e. from Solapur side. They gave dash to them and then they fell in a ditch which was by the side of the road and at that very time accused Balu assaulted Anil with Kukri. So also the present accused assaulted Anil and Rajendra. Thus, we find that as per the prosecution version accused persons were the the aggressors, while deceased Anil and his brother Rajendra were not the aggressors. So, we have to find out whose version is true and correct. It is true that while considering this aspect, initially the burden is on the prosecution to prove its case beyond reasonable doubt and so far as the contention of

the accused with regard to right of private defence is concerned, it is to be decided only on the touch stone ofpreponderance of probabilities and if it appears that right of private defence was available to the accused at the relevant time, then benefit of same has to be given to the accused. Bearing in mind this position, we have to scan the evidence on record to find out whether prosecution has proved its case beyond reasonable doubt or whether the contention raised by the defence appears to be probable.

11 . Accused has not adduced any evidence in support of their right of private defence. Of course, it is well settled that even if from the material on record it appears that there was possibility of right of private defence then same is to be considered and can not be negatived merely because no specific evidence has been adduced by the accused.

12. The first circumstance which was strongly relied on by the accused is that immediately after the occurrence of the incident the accused had

straightway gone to the police chowki and that too with the weapons and Balu had lodged a complaint, wherein he had clearly stated that he and his brother assaulted Anil and Rajendra with kukri and the other weapon, but had disclosed the circumstances under which they assaulted these two persons. It was also argued before us that there is evidence on record to show that Balu and Bharat had gone to Maree Aai police chowki at about 10.15.a.m. So if really the accused were not aggressors and had an intention to commit murder or to cause injury to Anil and his brother and they had in fact caused such injuries they would have absconded from the said place and in any case would not have gone straightway to the police station with weapons which were used by them. No doubt this is an important circumstance but one does not know in what manner a particular person would behave and react to a given situation. Merely because the accused persons instead of absconding went to the police station with weapons and informed the police about the incident, one can not jump to the conclusion that they were not aggressors or that whatever acts they have

committed were in the right of their private defence. It may be, that finding that at the said place some other three persons of complainant's side were approaching and there was possibility of they assaulting the accused, the accused must have thought it fit to go to police station. It is true that if really they had attacked Anil and his brother then it is difficult to believe that within such short time it would occur to them that they should take the stand of right of private defence. But while considering this aspect it appears that though police constable Pandurang Salunkhe, exhibit 83 has stated that at about 10.15 accused had been to maree aai police chowki and they made the complaint, there is no other document to show that the accused had been to that police chowki by 10.15 a.m. On the contrary, if we see the said report exhibit 84 we find that the same is registered at 13.15 hours i.e. after about three hours from the incident. So, though it is tried to be suggested that there was prompt lodging of the complaint the record shows otherwise. On the contrary, we find that in the meantime admittedly P.I. Deshpande had come to

know at Salgav Vasti police station about the incident and he had taken Special Executive Magistrate Gaikwad alongwith him to the General Hospital and there the Special Executive Magistrate had recorded the dying declaration of Anil in which he had clearly stated that Balu and his brother Bharat assaulted him and Rajendra with Kukri and knife. This dying declaration is recorded at 11.45 a.m. So, from the documents on record it appears that the complaint in respect of the incident was first lodged by Anil and not by accused. So, we are in fact not inclined to hold that the complaint of accused persons was lodged at the earliest occasion at 10.15 and that too prior to the time complaint of Anil was registered. So, merely because the accused had shown promptness in lodging the complaint with police wherein they had involved Anil and his brother we can not jump to the conclusion that the said circumstance is sufficient to hold that they were not the aggressors or that they assaulted Anil and Rajendra while exercising their right of private defence.

13. Secondly, it was argued before us that at the relevant time the accused had not even taken their motor cycle but had left the same at the place of incident and they went running to the police station. So, according to the learned Advocate for the accused that also shows that they were apprehending danger of assault being committed by the other persons and as such they ran away from the said place. When such is the position how can it be said that they were not the aggressors. It is infact really difficult to find out as to why at the relevant time instead of proceeding on their own motorcycle to police station accused chose to run away from the said place. While considering this aspect we can not ignore the fact that it has come on record that at the relevant time there was dash between the two vehicles. Whether the complainant gave dash to the vehicle of accused or whether the accused gave deliberate dash to the motorcycle of the complainant is to be seen. Admitted position is that there was dash and both the vehicles fell on the road. So, at the relevant time there was no sufficient time for the accused even to lift the

said vehicle. They may not be sure whether motorcycle would start or not. So, instead of that they might have found it convenient to escape from that place immediately by preferring to run away. So merely because the vehicle was lying at the place of offence we can't say that the accused were not the aggressors.

14. Much is made about the fact that both the accused namely Balu and Bharat had sustained some injuries and the said injuries have not been explained by the prosecution. It is true that normally when injuries are sustained by the accused it is necessary for the prosecution to explain those injuries. But that will depend upon the nature of the injuries. In the instant case, admittedly Balu had sustained very minor superficial injuries to his palm. Those were only abrasions. It was not at all bleeding injury. Same is the case in respect of the present accused Bharat. So, under such circumstances, there was absolutely no question of giving any explanation by the prosecution about the said injuries. The said injuries are mentioned in the medical

certificates exhibit 66 and 67 as shown below

Exhibit 66-Medical Certificate of Bharat Surve

1. Abrasion 1/2" X 1/4" on Rt.M/3 forearm radial aspect.
2. Abrasion 1/4" X 1/4" in between web of

3. H/o.Blunt Trauma

Exhibit 67-Medical Certificate of Balu Surve

1. 3 abrasions on left knee of 1", 1/2" & 1/4" in length.

2. Abrasion 1/2" X 1/2" on Rt.Foot medialary

3. Abrasions 2 in nos. 1" in length & 1/2" in length lt. Index finger 1st inter phalanger palmar aspect

4. Abrasion 1/2" in length Lt. middle finger proximal phalanx

5. Abrasion 1/4" in length Lt. ring finger middle phalanx

6. Abrasion 1/4" in length Lt. little finger disal pahalnx

7. H/o. Blunt trauma - No external injury- Lt. ear

8. H/o. Blunt trauma No.external injury -Lt. shoulder

It was strongly argued before us that the injuries sustained by Balu to his palm in fact suggest that the defence version is true and correct. According to defence the said injuries are possible if one tries to snatch akukri from the hands of the assailants. It is pertinent to note that in the complaint filed by Balu (exhibit 84) it is mentioned that at the relevant time Rajendra took out kukri from the dicky of his motorcycle and when he was about to assault, Balu snatched it from his hands. If we admit this position, then it must be presumed that as Rajendra had an

intention to give a blow with kukri he must be holding the same firmly. When the assailant is having a firm grip on the weapon and other person is trying to snatch it then obviously he must also apply considerable force for snatching it. It is needless to say so that kukri is a weapon having a sharp edge. So, if really the accused had made an attempt to snatch kukri from the hands of Rajendra then definitely he would not have sustained only superficial minor abrasions as shown in the certificate but definitely he would have sustained some incise wound to his palm, but that has not happened. So, while considering this aspect the statement given by doctor becomes important when the doctor says that these injuries may be self inflicted. An attempt is made to show that there was in fact no sufficient time for the accused to get such injuries but when we find that they had admittedly proceedings towards police station alongwith weapon and they had shown such smartness in lodging the complaint against deceased Anil and Rajendra, there was sufficient time for them to have such self inflicted injuries. While considering this evidence one must also note that

if we see the injuries on the person of deceased Anil we find that he had sustained about 9 to 10 grave incise wounds. Besides that he had also sustained one incise wound to his palm and finger so that would in fact show that when the accused were assaulting him with kukri and knife , in order to save from their attack or to hold the weapon with which the accused were assaulting Anil must have tried to hold the weapon and in that process he sustained incise wounds to his palm and fingers. This would be helpful only to point out that if anybody would have tried to resist or to snatch the weapon like kukri from the assailants hands then at that time the possibility was to have some incise wound to fingers and palm and not mere superficial abrasions. So, finding of some abrasions on the left palm of Balu and Bharat would not show that they were not aggressors or that the assailant was Rajendra and accused only snatched the said kukri from his hands.

15. It is the version of the defence that at the relevant time when they were proceeding towards Solapur for lodging a complaint against

Anil and Rajendra , for the earlier incident Anil and Rajendra came from their backside on motorcycle and gave dash and as a result of the same Balu and Bharat fell in the ditch. If really this would had happened, then we would have found mud stains on the clothes of Balu and Bharat. But if we see the panchanama of the clothes of accused which is at exhibit 46 we find that so far as shirts of the accused are concerned, they were not at all mud stained and on the pants also there were very few mud stains as compared to that of the mud stains which were found on the clothes of the deceased and Rajendra. The clothes of deceased are at exhibit 44. From the same it appears that the version of the accused that Rajendra and Anil first gave dash to them and as a result of the same they fell in the ditch does not appear to be probable and acceptable. From the background of the above mentioned facts and evidence if we consider the evidence of prosecution and in particular the evidence of P.W.1 Rajendra Wankar and dying declaration of Anil Wankar exhibit 61 we find that the version of prosecution is true and correct. Rajendra Wankar

has specifically stated that at the relevant time when they were proceeding towards Solapur, the accused and his brother Balu came from the opposite side on motorcycle and gave dash and as a result of the same they fell in the ditch and at that very time accused Balu with Kukri and Bharat with knife assaulted both of them. It must be noted that similar version is given by Anil in his dying declaration exhibit 61 and complaint exhibit 62. The said dying declaration is recorded by Special Executive Magistrate after following due procedure. There is nothing in the cross examination of the Special Executive Magistrate or even the doctor who made endorsement on the dying declaration to show that at the relevant time Anil was not in a position to give statement or that the said statement was not voluntary. So from this evidence it is very clear that the accused were the aggressors.

16. Incidently, it must also be noted that even according to accused at the relevant time Rajendra took out kukri from the dicky of his motorcycle and he was about to give blows and at

that time Balu snatched the said kukri and thereafter he gave blows to Anil and not to Rajendra. Normally after snatching the weapon from the assailant a person is first likely to hit the assailant with the said weapon, but here we find that as per the case of defence after snatching the said kukri from the hands of Rajendra, Balu gave blow with it on the head, abdomen and chest of Anil. It is pertinent to note that it is not the defence version that at the relevant time when Rajendra brought kukri and Balu snatched it from his hands Anil was obstructing him or he had tried to hold Balu and as such he gave blow to Anil. Otherwise normally when kukri was brought by Rajendra and he was about to assault, after snatching the said knife anybody would have given first blow to Rajendra, but here we find that blow was given by kukri to Anil. In fact several blows were given to him by kukri. So this also suggests that kukri must not have been brought by Rajendra but accused was infact having said kukri with him and he made deliberate attack with the same on Anil, as stated by Rajendra and P.W.5 Nisar Shaikh, exhibit 93.

So, this also indicates that the contention of the accused that they were not the aggressors and they acted in the right of their self defence is not true and even probable.

17. It is worth to note that this is a case where we find that as per the version of the accused though the other side namely Anil and Rajendra were the aggressors and accused had only snatched the kukri from the hands of Rajendra, we do not find injuries on the person of Balu and Bharat, except minor superficial injuries sustained by them to their palm. If really Rajendra and Anil would not have been aggressors and incident would have occured as suggested by the defence then atleast we would have found some injuries on the person of Balu and Bharat because even as per the defence version Anil was a strong man but curiously enough we find that there are no other injuries on the person of Balu and Bharat. As against that if we see the injuries which were on the person of Anil we find that there were in all 18 injuries and most of them were incise wounds and some are stab wounds. So finding of

several injuries of grave nature also indicates that accused were aggresors and they must have given those blows to Anil with a view to finish him and the same cannot be caused while exercising the right of private defence. It is pertinent to note that even as per the contention of the accused the moment Rajendra brought kukri and was about to assault, it was immediately snatched from his hands. So at that very moment Rajendra was disarmed. It is not even the contention of the accused that at the relevant time Anil was having any other weapon as mentioned earlier. It is also not the case that when Balu was snatching kukri from the hands of Rajendra, Anil intervened or he tried to take away that kukri in his hand. When such was the position that Rajendra was dis-armed and Anil was not having any other weapon with him, the act of Balu giving several blows one after the other on vital parts of Anil can not be regarded as an action taken in self defence. Normally, the right of private defence comes to an end when the assailant is disarmed. It is true that some times there may be apprehension in the mind of the concerned person that though initially he

succeeded in taking away the weapon then again the other person is likely to over power and likely to hit him. But in the instant case we find that there was no such attempt on the part of Anil or Rajendra even as per the defence version. It was also not the case that besides Anil and Rajendra there were other persons. So, under such circumstances we are not inclined to hold that the blows given by Balu and Bharat to Anil and Rajendra were in their self defence. So the injuries which were found on the person of the accused were of very trivial nature while the injuries on the person of Anil and Rajendra were several in number and the same were also on vital parts. So, under such circumstances it has to be said that Balu and Bharat were the aggressors. In similar circumstance, in a case M/s. Lokenath Tolaram etc vs. B.N.Rangwani & Others AIR 1974 SC 150, it was held that the accused were the aggressors. It is well settled that aggressors can not claim right of private defence. It has been so held in various authoritative pronouncements such as Mannu and others vs. State of U.P. 1979 Cri. L.J. 1023 (SC) and Madho Ram

& Ors. vs. State of U.P. AIR 1981 SC 651.

18. From the above discussion it is very clear that there is ample evidence on record which shows that the accused were in fact aggressors and they assaulted deceased Anil and Rajendra and Anil succumbed to the injuries sustained in the said assault. An attempt has been made to show that the injuries that were sustained by Anil were mostly caused by Balu with kukri and there is no sufficient evidence to show that the present accused Bharat had also caused any injuries to Anil. But if we peruse the evidence of Rajendra exhibit 53 as well as witness Nisar Shaikh exhibit 93 we find that both of them have categorically stated that at the relevant time not only Balu gave blows with kukri to Anil but even Bharat also assaulted Anil with knife. It is true that the alleged knife which is before the Court is not the regular knife. Appearance of the same is definitely like an instrument called **Adkitta** (betelnut cracker) which is used to break nuts. However, generally in case of Adkitta the blade is fixed on one side while in the case of adkitta

which is before us it appears that if both the handles are stretched in opposite direction it becomes a regular knife with blade at the middle. So once both the handles are folded accordingly the same can be used as knife. It is true that witness Rajendra had not stated before police the details about the various injuries sustained by him and Anil, but merely because he was not in a position to state as to which injury was caused by whom and with what weapon, it can not be said that the evidence of Rajendra can not be accepted in this behalf. When such a ghastly attack has been made on Anil and Rajendra and the entire incident has taken place within few minutes and when Rajendra was also being assaulted with such deadly weapon on vital parts it is difficult to except that he would be in a position to state specifically as to which accused gave which blow and on which portion of the body. So merely because of this it can not be said that there is any such infirmity in their evidence which would create any doubt about their veracity.

19. As accused Balu has died during the

pendency of the Sessions Case and it appears that most of the injuries on the person of Anil were caused due to assault by kukri, an attempt has been made on behalf of the defence to show that in any event the present accused Bharat can not be convicted for the offence punishable under section 302 r/w. 34 of I.P.C. because there is no evidence on record to show that there was any premeditation or that both these accused had any specific plan to commit murder of Anil. However, while considering this aspect we can not ignore the fact that both the accused together accosted the deceased & Rajendra and then Balu who is the brother of present accused has given several ghastly blows to Anil when he was not having any weapon with him and when such was the position the present accused took out his Adkitta , used it as a knife and gave as many as atleast three blows on vital part of the deceased Anil. This clearly indicates that it was their common intention to finish Anil.

20. The learned advocate for the accused submitted that individual liability for acts done

in furtherance of common intention is incurred vacarously only when criminal act is done by several persons in furtherance of common intention of all. For this purpose reliance has been placed on a case Ahir vs. State of Bihar AIR 1971 SC 1834. From careful reading of this authority it is clear that facts of the said case and the facts of the case in hand are different. In that case no overt act was on the part of the appellants was proved or established to show that they share the intention of the person or persons who inflicted injury or injuries on the head of the deceased which led to his death. However, in the instant case, as pointed out above, the present accused has also given blows with deadly weapon to Anil not only at the time when he was without weapon but at the time when the co-accused had already given several blows with deadly weapon on vital parts to him and he had sustained grave injuries. So this act of present accused clearly indicates his intention . Ultimately, intention is not a thing of tangible proof. It has to be gathered or inferred from all the facts, circumstances and conduct of parties. In the instant case, the

conduct of Rajendra clearly shows that he had same intention that of his brother and that was nothing but to finish Anil. So we do not think that there is any substance in the argument advanced by the learned Advocate for the defence that the present accused had no common intention with Balu to commit murder and the present accused can only be convicted for the offence punishable under section 326 of I..c.

21. It has come on record that at the relevant time prosecution witness Rajendra, exhibit 42 who was also severally assaulted by Balu and Bharat with deadly weapons and ultimately he had sustained the following injuries mentioned in the injury certificate exhibit-37.

1. Incise wound 2" x 1" penetrating in abdomen-Rt. lumber region

2. Incised wound 1/2" X 1/2" X thoracic spine deeply- Thoracic spine U/4

3. Incised wound 2" X 1" penetrating in

abdomen-Lt. Laterial border of abd-Hypochrodome

4. incised wound 4" X 1/2" tapering down in right-right shoulder

5. Incised wound 1" X 1" muscle deep-Rt. ear tabule

6. Incised wound 1" X 1" bone deep-Rt.Scapula

7. Incised wound 1" X 1" muscle deep Rt renal angle

8. Incised wound 1" X 1" bone deep Lumbo sacral vert.

9. Incised wound 1 1/2" X 1" bone deep-T 10 T 11 vert.

It is an admitted fact that as a result of the above mentioned injuries and in particular to the injury sustained to the spine he was required to be operated by Dr. Kanitkar. Not only that, as a result of the said injury he sustained paralytic

attack and now he is not in a position to move. So when both the accused persons had assaulted him so severally, it goes without saying that both of them had the intention to commit his murder. However, fortunately, Rajendra survived, so the trial Court has rightly held that the accused is guilty of the offence punishable under section 307 r/w.34 of I.P.C.

22. We have no hesitation to hold that in the instant case the totality of evidence on record neither establishes even the reasonable possibility of the right of private defence in favour of the appellant nor it throws the cloud of doubt on the prosecution case. The evidence on record is cogent, consistent and convincing so as to prove the prosecution case beyond reasonable dount. The learned trial judge has properly appreciated the evidence on record and after considering each and every aspect of the evidence has rightly held that the accused has committed offences punishable under section 302 r/w.34 I.P.C. and 307 r/w.34 of I.P.C. There is no reason to interfere with the said finding.

23. Before parting with this case it is necessary to mention that while starting with the arguments of this case the learned advocate for the accused placed on record four affidavits. First is of Rajendra Damodar Wankar i.e. P.W.1 exhibit 42, the injured eye witness in the instant case. secondly, Ramchandra Bhanudas Jadhav, thirdly of Prakash Damodar Wankar, brother of deceased Anil and present P.W.1 and lastly that of wife of Anil, namely Manisha Wankar. In the above mentioned affidavits it has been stated that when the Sessions case No.244/93 was pending before the 4th Additional Sessions Judge, Solapur, accused Balu was murdered on 20th August 1994 at Shivni, Solapur. On the allegation of said murder, present P.W.1 Rajendra and his brothers and some other persons, in all nine persons were arrested. It is also observed in these affidavits that there are several disputes between these two groups and some chapter cases were also pending. However, the elderly persons from both the groups as well as some social and political workers tried to convince both the groups and both the groups

decided to put an end to their revalry anddisputes. In the affidavit of Rajendra D.Wankar i.e. the injured eye witness in the instant case, it is mentioned that he is injured person in the instant case, however, now he is not having any grievance against the present accused Bharat and it is his desire that he should be acquitted in the instant case. Similarly in the affidavit of the widow of deceased Anil, it is stated that in view of the settlement between the parties it is her desire that the accused be acquitted in the instant case. Firstly, it is to be noted that all these affidavits are sworn on 7.10.1998. However, produced before us very recently i.e. on 16.12.2004. It is really very strange to find that though the Sessions Case No.244/93 was already decided and the accused was convicted, the injured eye witness Rajendra Wankar and the widow of deceased have filed such affidavits. Admittedly, in this case accused Bharat is on bail. So, we are constrained to observe that the production of such type of affidavits and such type of settlement indicates that he has mis-used the bail. There was no

reason for him to approach either to the injured person or to the widow or to any other person and then seek such type of affidavit and come before this court to show that it is the desire of injured and widow of deceased that the accused should be acquitted. It is needless to say that such type of affidavits have no legal sanctity particularly when we find that the accused is convicted by the trial court for the offence punishable under section 302 r/w34 I.P.C. and 307 r/w.34 I.P.C. which are non compoundable offences. It can even be said that by producing such type of affidavit the defence has in a way tried to prejudice the mind of the Court or to gain sympathy. So we have not considered these affidavits while appreciating the evidence on record.

24. In this view of the matter, the Appeal is dismissed. The order of conviction and sentence passed by the Court of 4th Additional Sessions Judge, Solapur, in Sessions case No.244 of 1983 is confirmed.

. Accused to surrender his bail bond forthwith.

(S.S.Parkar, J)

(S.R.Sathe, J)

1. Incised ------1/2" X 1" over lumbo sackal region, Bone deep bleedings.

2. Incised wound over rt. scapular region, Bone deep bleedings

3. Abrasion over right scapular region-longitutional 1cm breadth.

4. Incised wound at T10-T11 4 X 1 1/2c Bone deep bleeding.

5. Incised wound over rt. lumbar region 5 X 2cm on ant.

6. Incised wound over lt. hypochondriac region 6 X2cm Bleeding.

7. Incised wound over Rt. lumbar region post aspect 2 1/2"X 1 cm.

8. 2 incised wounds over thoracic region

No active bleeding.